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IN THE SUPREME COURT OF THE UNITED STATES.
October Term 1949.

No. 508

O. O. OWENS, *Petitioner,*

vs.

THE UNITED STATES OF AMERICA, *Respondent.*

REPLY TO BRIEF IN OPPOSITION.

The falsifications of the facts and the distortions of the Record in Respondent's Brief in Opposition requires the filing of this Reply Brief which your Petitioner prays this Court will receive and consider.

On page 2 of Brief in Opposition, under the heading, "Question Presented," appears the following:

> "* * * This in turn depends upon whether the Court of Appeals exceeded its jurisdiction, and whether the District Court, in the present proceeding, erred in finding that the evidence did not support taxpayer's claim of conspiracy (allegedly involving the Commissioner of Internal Revenue and others) to deprive him of his day in court."

That the Court of Appeals did exceed its jurisdiction is made abundantly clear by the short argument of that proposition on pages 24 and 25 of Petitioner's Brief in support of his Petition filed herein.

It will be observed the trial court made no findings of the facts of the FRAUDS (R. 28-29), although the frauds

were not denied by Respondent but were abundantly proved and established by Petitioner's documentary evidence—notwithstanding Respondent suppressed other documentary evidence and oral testimony which would have also proved and established both conspiracy and the frauds perpetrated pursuant thereto.

The Record, at page 129, reveals that during the course of the trial and without knowing or considering the contents of the great bulk of documentary evidence immediately theretofore introduced by Petitioner, and which evidence conclusively established the frauds as well as the conspiracy, the Trial Court stated:

> "Now then, with reference to the question of conspiracy: I realize that the defendant in this case is carried away by that but I can't find any evidence in this case to convince me that any one department or more than one department, either the Treasury of the Attorney General's Office or of the Commissioner of Internal Revenue, that evidence establishes *a direct and wilful* conspiracy to deprive the Petitioner, the defendant of his rights, and so find in addition to the other facts."

All conspiracies are willful; most are indirect.

It is obvious the Trial Court's Finding of Fact IV (R. 29):

> "That the defense offered by the defendant relative to a conspiracy to deprive him of his day in court and the further defenses offered by the defendant were included in the former case of *Owens* v. *Commissioner*, 125 F. (2d) 210. That the evidence is not sufficient to support the claim as to any conspiracy nor that the defendant was denied his day in court."

is merely reiteration of the previous finding (R. 129) but omitting the peculiar characterization "direct and wilful

conspiracy." It is equally obvious the Trial Court intentionally used the expression "direct and wilful conspiracy" to distinguish the conspiracy proved by Petitioner, and not denied or attempted to be refuted by Respondent, from an intentionally designed and effectuated conspiracy.

Moreover, the Finding (R. 29):

> "That the defense offered by the defendant relative to a conspiracy to deprive him of his day in court and the further defenses offered by the defendant were included in the former case of *Owens* v. *Commissioner*, 125 F. (2d) 210."

was obviously made in complete disregard of the Record facts.

The Record (395-665) clearly demonstrates that there was no issue of conspiracy, or of collusion and frauds, in *Owens* v. *Commissioner* reported in 125 F. (2d) 210, and that opinion on its face so shows. There the issues were limited to Petitioner's liability for tax on $75,989.20 extorted from him in 1920 by the Secretary of Interior, and whether Petitioner could be held liable for interest on any deficiency, however small, for the eight years, four months and two days' delay in the decision of the case caused by the unauthorized intercession of unauthorized attorneys pretending to repesent Petitioner, whose lack of authority was at all times known by the Commissioner of Internal Revenue, his attorneys and other representatives.

The Record also reveals (R. 357-359, 585-609) that, after the Board of Tax Appeals in November, 1939, had heard the evidence only and before all the briefs were filed, Petitioner, on March 26, 1940, discovered convincing proof that the unauthorized appearances and acts of the unauthorized attorneys pretending to represent your Petitioner—the second of whom had stipulated away your Petitioner's defense

to the asserted deficiency—and the acts of the attorneys for the Commissioner of Internal Revenue, in cooperation with such unauthorized attorneys, resulted and flowed from a perfectly designed and well concealed conspiracy between such unauthorized attorneys and attorneys for the Commissioner of Internal Revenue, and also resulted and flowed from a conspiracy between attorneys for the Commissioner, to deprive and to defraud your Petitioner of a hearing or opportunity to be heard and also to enable the Board of Tax Appeals to decide the case upon part only of the facts of your Petitioner's defense—such part to be falsely stated and fraudulently stipulated;

That upon discovery of such proof your Petitioner immediately sought to reopen the case (R. 357-359, 585-609) and to offer full proof of such conspiracy, but the Board denied him leave so to do (R. 623), and based and grounded its decision, in part, upon the identical falsely stated facts previously fraudulently stipulated (R. 621-622); that thereafter when that fact had been called to the Board's attention (R. 623-667) the Board made important changes in its Findings of Fact, without changing its Conclusions of Law which conformed to the falsely stated facts set forth in an opinion of the Court of Appeals in another case (R. 621-623), which latter opinion was also based upon the aforesaid falsely stated facts fraudulently stipulated, and which omitted any reference whatever to the deduction, or the facts thereof, in controversy in Petitioner's 1920 case.

On pages 2 and 3 of Respondent's Brief the following statement appears:

> "On February 13, 1926, the Commissioner determined a deficiency in the taxpayer's income tax liability for the taxable year 1920, and on that date sent him, by registered mail, a written notice of such determination. Within sixty days thereafter, a petition was

filed by the taxpayer with the Board of Tax Appeals seeking a redetermination of such deficiency. On February 13, 1941, the Board redetermined such deficiency in the sum of $28,260.61."

Had the Trial Court found and had Respondent stated: EXACTLY FIFTEEN YEARS LATER the Board redetermined the deficiency in the sum of $28,260.61, such amount being the tax determined to be due on $75,989.20 of the taxpayer's income which he claimed the Secretary extorted from him in 1920—such statement would shock, would amaze and would dumbfound this Court. Nevertheless such statement is correct and is the substance of the immediately above quoted excerpt from Respondent's Brief.

With no deaths requiring revivor of the action, with no third parties' rights intervening to complicate or delay redetermination by the Board, in the amount of $28,260.61, of a deficiency originally determined in the amount of $54,852.90 and thereafter reduced to $36,116.86 by the Commissioner, any court should be dumb-founded by such delay, and should also be disturbed by the question: What caused such prolonged delay?

The Answer: Conspiracies and frauds, including forgery committed by an Assistant Chief Counsel for the Commissioner, to deprive and defraud Petitioner of a hearing or opportunity to be heard in defense against such deficiency which had been fraudulently determined in the first instance; the fraudulent substitution of unauthorized attorneys for Petitioner's attorney of record before the Board; the fraudulent stipulating by the second unauthorized attorney and an attorney for the Commissioner of falsely stated facts as the facts of Petitioner's defense; the omission of any reference to any fact relating to the payment in 1920 by Petitioner of $75,989.20 extorted from him by the Secretary; the conspirators' conniving—for eight years and four months after the first unauthorized attorney fraudulently

entered his "appearance" as Petitioner's attorney before the Board—to retain the benefits of their frauds, including forgery, and their seeking to enforce the Board's affirmance, also obtained by fraud, of the deficiency in the amount of $36,116.86; their prolonged, bitter resistance of Petitioner's efforts to vacate the Board's affirmance of such deficiency; and finally—after the Board's affirmance of the $36,116.86 deficiency had been vacated—the time required for the Board to distort the true facts of Petitioner's defense, against the $28,260.61 residue of such deficiency, in such manner as to pretendedly support its predetermined decision to hold Petitioner bound by the falsely stated facts fraudulently stipulated by the conspirators, and also to hold Petitioner liable for tax on his income that had been extorted from him by the Secretary—all of which was charged by Petitioner (R. 6-23), none of which was denied by Respondent in the Trial Court, all of which Petitioner abundantly proved by documentary and oral evidence (reflected by the entire Record), none of which Respondent attempted to refute or to disprove—except by suppressing additional documentary evidence in its exclusive custody and the oral testimony of witnesses under its control.

On page 3 of Respondent's Brief appears the following:

> **"On December 6, 1946, there was paid by a third person the sum of $350 for application on the tax liability of the taxpayer, leaving an unpaid balance of $53,783. (R. 29) This balance, plus interest, is still unpaid. (R. 29)"**

The quoted sentence ending with "$53,783" is an excerpt from Finding II of the Trial Court and omits the language that immediately follows, to-wit:

> **"* * * which payment was made without the knowledge or consent of O. O. Owens who refuses to accept credit therefor."**

Why was a period substituted for the comma immediately following the figures "$53,783," and the balance of the Finding, "which payment was made without the knowledge or consent of O. O. Owens who refuses to accept credit therefor." omitted from Respondent's Brief if not for the purpose of trying to mislead this Court by making it appear Petitioner had accepted the benefit of such unauthorized payment by a third person, and, in consequence, had ratified the asserted deficiency.

The significance of such omitted language is greater than appears from the excerpt, quoted by Respondent, standing alone. It is as typical of the conduct of the Commissioner of Internal Revenue, his officers, agents, attorneys and other representatives from the inception of this case in 1921—particularly throughout all proceedings before the Board and before the courts—as the forgery committed by an Assistant Chief Counsel for the Commissioner, demonstrated by Exhibit "A" to Petitioner's Petition filed herein. It is also an attempt to duplicate the impression created by the maliciously false statement, "the taxpayer admitted the allegations of the complaint * * *" on pages 6 and 7 of Respondent's Brief filed in the Court of Appeals, which statement was adopted by that court and embodied in its opinion notwithstanding Petitioner in his Reply Brief specifically called that court's attention to the falsity of such statement and that its purpose was to make it appear Petitioner had thus confessed judgment.

On page 4 of Respondent's Brief appears the following:

> **"The case turns on its own peculiar facts. No general question of importance is raised which calls for further review."**

Respondent concedes the facts are "peculiar." The conspiracy, and frauds perpetrated pursuant thereto, are no doubt unique—and were effective. What about the denial of due process? That is certainly a general question of importance—at least important to all except conspirators, and only an inconvenience to them.

But, there IS ALSO RAISED another general question of importance, supposedly long settled, which calls for further review. That question is: May Public Officers connive with rogues to rob a citizen of his property, may they exercise a veto upon the means employed for their detection, and may Respondent retain the benefits of a judgment or deficiency obtained by the conniving of its officers with rogues and by the frauds perpetrated by them?

The "peculiar" facts of this case and the Court of Appeals' opinion certainly call for further review unless Petitioner is to be subjected by Respondent to peculiar law applied to the admitted "peculiar" facts.

Respondent's position is that since the facts of this case are peculiar and unique and may probably never be duplicated no general question of importance is raised; that it should be permitted to retain the benefits of the frauds of its officers, attorneys and other representatives, and until and unless its officers, attorneys and other representatives make a practice of duplicating the identical frauds on all taxpayers no general question of importance will be raised —that isolated, peculiar frauds perpetrated upon isolated individual taxpayers by Government Officials should be permitted to stand unredressed even though the frauds deny due process.

On page 5 of Respondent's Brief appears the following:

> "Ultimately, the sole issue presented to the Board for its decision relating to the 1920 case was whether taxpayer was entitled to a certain deduction from gross income for that year. (R. 610, 619) The decision of the Board denying the deduction was rendered *upon a full hearing had before it,* at which a new stipulation was introduced (R. 453), as well as evidence both oral and documentary adduced by the taxpayer and the Commissioner (R. 423-550), the taxpayer appearing *pro se, as well as being represented by two lawyers* (R. 424)." (Emphasis mine.)

The word "ultimately" as used by Respondent means the FIFTEEN YEARS' delay heretofore explained. The inference is that the presence of a sufficient number of lawers guarantees a full hearing and due process. The Record discloses (R. 437-476) that at the hearing denominated "a full hearing" in Respondent's Brief, Petitioner was required by the Board to use the "stipulation" fraudulently entered into February 5, 1931, by the second unauthorized attorney and an assistant to the Chief Counsel for the Commissioner; that some of the most material and decisive facts of your Petitioner's defense to the 1920 deficiency had been entirely omitted from the fraudulent stipulation; that other material and decisive facts had been falsely stated in such fraudulent stipulation; but that proof of such omitted facts was supplied by Petitioner, and the false statements of fact were corrected where counsel for the Government would agree, but where agreement could not be reached the true facts were established by documentary and oral evidence; and

That while there were supposedly two lawyers present at the continued hearing and appearing for Petitioner, one, Mr. Hansen, was Petitioner's office manager and accountant, who was present as a witness and testified as to Petitioner's method of accounting and reporting (R. 512); that the other, Mr. Swindler, lived and practiced in Washington, D. C., and had been employed by Petitioner (R. 434) to watch the docket of the Board and to prevent further complications by the appearance and conduct of additional unauthorized attorneys should they attempt to enter the case; that neither Hansen nor Swindler had any knowledge of the facts relating to the deduction of $75,989.20 then in controversy nor of the transaction out of which such claimed deduction arose, and

That your Petitioner was the only person, then living, who was familiar with those facts, who had a clear recollection of them and, in consequence, was in position to interrogate witnesses about matters ancillary to or relating to those facts, and who could testify to the facts which Petitioner could not establish by documentary evidence because of the absence of Petitioner's records—which had been stolen or surreptitiously removed from the files and custody of his former attorney of record and none of which, then, nor since, have ever been returned to your Petitioner.

The Record (620-623) also discloses that after the aforesaid hearing was concluded the Board ignored the true facts thus adduced and established by documentary evidence as well as by oral testimony—and in writing its opinion based its decision, in part, (R. 621-623), upon some of the identical falsely stated facts previously fraudulently stipulated by the second unauthorized attorney pretending to represent your Petitioner and by an assistant to the Chief Counsel for the Commissioner of Internal Revenue.

A full hearing requires not only the opportunity to present all the evidence but also giving consideration to and deciding the case upon all such evidence. In the hearing, denominated a "full hearing" in Respondent's Brief, Petitioner was deprived of the opportunity of offering his records that had theretofore been stolen from his former attorney of record and which had never been returned to him. Notwithstanding, in the absence of such records, your Petitioner, by collateral evidence, proved and demonstrated the true facts, such evidence was entirely ignored by the Board. Therefore, to all intents and purposes, such hearing denominated "a full hearing" might as well never have been held and that farcical proceeding could as well have been dispensed with, and the Board could as well have used

the language of the attorney for the Commissioner with reference to the fraudulent stipulation and his insisting that it be used, to-wit:

> "We stipulated these facts before. If it is good enough for one case it is good enough for this case. The fact of the matter is in docket No. 14379 I think Your Honor will find that stipulation in the file." (R. 437)

Also on page 5 of its Brief in Opposition Respondent states:

> "He contends *that in some way* he was denied his day in court because of fraud and conspiracy between Secord and representatives of the Government." (Emphasis mine.)

Petitioner does not make, and has never made, the contention he was "in some way" denied his day in court.

On the contrary, the Record discloses Petitioner proved, in proper sequence and step by step, the conspiracies, and the frauds perpetrated pursuant thereto, to deprive and defraud your Petitioner of a hearing, or opportunity to be heard, in defense against such deficiency (R. 355-411, 620-623); that at all times up to March 26, 1940 (R. 357-359) your Petitioner, in the absence of proof to the contrary, had proceeded upon the belief that the deficiency had previously been sustained by the Board of Tax Appeals as a result of accident, confusion, inadvertence and mistake (R. 765-767), and had presented his defense to the deficiency accordingly; but

That, on March 26, 1940, Petitioner discovered convincing proof (R. 357-359) that he had previously been deprived and defrauded of a hearing and an opportunity to be heard, and had been deprived and defrauded of an opportunity to present the true facts of his defense as a result

of conspiracies between unauthorized attorneys pretending to represent Petitioner and attorneys for the Commissioner of Internal Revenue, and also as a result of conspiracy between the officers, agents, attorneys and other representatives of the Commissioner; and that all the prior acts of such unauthorized attorneys and attorneys for the Commissioner resulted and flowed from perfectly designed and well concealed conspiracies to deprive and defraud your Petitioner of an opportunity to present, and to have considered by the Board, the true facts of his defense;

That notwithstanding your Petitioner, upon discovery of such convincing proof, immediately sought leave to reopen the case and to offer proof of such conspiracies and frauds before the case was decided by the Board (R. 357-359), such leave was denied and thereafter the Board, in part (R. 621-623), based its opinion upon the identical falsely stated facts fraudulently stipulated by the second unauthorized attorney pretending to represent your Petitioner and an assistant to the Chief Counsel for the Commissioner (R. 376-385).

There was no vague, uncertain and indefinite characterization by Petitioner that he was "in some way" denied his day in court. Instead there was positive proof of the conspiracies and the frauds perpetrated pursuant thereto which deprived and defrauded your Petitioner of his day in court. Nowhere in the Record does there appear any denial by Respondent of the allegations of such conspiracies, collusion and frauds. Instead, Respondent moved to strike such allegations, "All upon the grounds and for the reasons that the same is redundant, immaterial, impertinent and scandalous." (R. 19-20)

Moreover, Respondent offered no evidence in an attempt to refute Petitioner's oral and documentary evidence

which proved and demonstrated such conspiracies and frauds, which were effectuated, and which deprived and defrauded your Petitioner of his day in court.

Moreover, Respondent suppressed documentary records, some of which were your Petitioner's own records that had been stolen or surreptitiously removed from the files of his former attorney of record, and suppressed the oral testimony of witnesses, all of which evidence would have more conclusively established the existence, the intent and purpose of the conspiracies, the frauds perpetrated upon Petitioner pursuant thereto and the effect of those frauds of depriving and defrauding your Petitioner of his day in court.

On page 6 of the Brief in Opposition Respondent states:

> "The Board denied the deduction upon the ground that taxpayer was on the cash basis of accounting and was not entitled to a deduction since the money alleged *to be paid was not paid in the taxable year;*" (Emphasis mine.)

That quoted statement refers to another fraud perpetrated by the Board in its memorandum opinion (R. 253, 261, 620-621). Notwithstanding Petitioner for all years prior and subsequent to 1920 was on the accrual basis of accounting—and of reporting income for taxation and had never sought leave to change and had never been changed by the Commissioner from the accrual to cash basis of reporting (R. 477-550)—the Board held Petitioner bound by an obvious typographical error on the face of Petitioner's incomplete tentative returns, which were qualified in every conceivable manner and filed with an explanation that they were incomplete and incorrect and reserving the right to file a completed, correct amended return (R. 257, 85-86), and

Notwithstanding Petitioner's books for 1920 had been submitted in the first part of the 1939 hearing by Petitioner's accountant, Mr. Hansen, and had been thoroughly examined by Respondent's attorneys and other representatives (R. 411-423), and

Notwithstanding such books showed they were kept on accrual basis, and—except the deduction of the $75,989.20 extorted from Petitioner, which was not presented by Hansen in the first part of the hearing because of his lack of knowledge of the facts and because of Petitioner's illness and absence—all deductions raised in Petitioner's original Petition filed in 1926 with Board, and two deductions or issues not raised therein were allowed (R. 411-423)—which reduced, to $28,260.61, the previously asserted deficiency of $36,116.86, and

Notwithstanding, in the continued hearing held in November, 1939, all the evidence with reference to books, to accounting and reporting income related to the business, books and reporting by the partnership of Gayer and Owens, as partners, and as individuals for 1919 and prior years—and such evidence established the fact that for 1919 and all prior years Petitioner was on the accrual basis of accounting and reporting (R. 423-550)—

Nevertheless, the Board (R. 620) first found and concluded Petitioner kept NO books for 1920; then by interlineation corrected such finding to recite "no PROPER books" were kept, and

To sustain the first finding of NO BOOKS, the Board referred to the testimony at the continued hearing (R. 423-550) about the partnership books for 1919 and prior years —which partnership had been dissolved twenty years and its books and records scattered, lost or destroyed—as

"No books of account are in evidence which would

bear on petitioner's contention, and the records which were mentioned at the hearing, though not produced, do not give an indication that they were kept either as regular books of account or on an accrual basis. Consequently respondent's contention must prevail." (R. 620-621), and—

The Board, by such legerdemain, ignored not only the established true facts but also ignored its own finding of the extortion—the award of additional moneys out of the impounded funds to Martha Jackson in 1920—and, to arrive at its predetermined decision to deny the deduction, held Petitioner's 1920 RETURN was not on the accrual basis (R. 619).

Notwithstanding the Board in its opinion (R. 620) found the substance of the 1920 stipulation as "(which awarded additional moneys out of the impounded funds to Martha Jackson)" and thus found payment of the extortion to have been made by Petitioner in 1920, in complying with the Secretary's unlawful and void order, and

Notwithstanding the receiver thereafter held more in trust for Martha Jackson and held correspondingly less in trust for Petitioner and his associates, Brazell and Johnson, and

Notwithstanding after execution of "the 1920 stipulation (which awarded additional moneys out of the impounded funds to Martha Jackson)" (R. 620) Martha's legal representative (Parmenter) and two others—McKinney, the illegally appointed interloper-guardian (R. 215-216), and the Secretary of the Interior, both claiming the right to administer Martha's estate (Deft. Ex. 18, R. 231-245; Deft. Exs. 3 to 13, incl., R. 199-214)—asserted or exercised dominion, supervision or control of such "additional moneys awarded out of the impounded funds to Martha Jackson"—

Merely because the receiver, as one trustee for Martha, did not, until 1922, DISTRIBUTE the assigned or awarded funds to the Superintendent of the Five Civilized Tribes,

as another trustee, by agreement, for Martha—such delay in DISTRIBUTION being caused by the struggle between the contending guardians and the Secretary in which each sought to get possession of and to administer the awarded impounded moneys—

The Board, in its memorandum opinion, capriciously and deliberately confused such DISTRIBUTION in 1922 with the PAYMENT by Petitioner in 1920—"(which awarded additional moneys out of the impounded funds to Martha Jackson)" and held:

> **"It will be observed from the findings of fact, *supra,* that it was not until September, 1922, that the money was paid out of the impounded funds to the Superintendent of the Five Civilized Tribes for the benefit of Martha Jackson. Consequently if petitioner's tax return was compiled on the cash basis for the year 1920, neither a loss nor an expenditure in that year can be claimed since no money was actually paid in that year." (R. 620)**

The award of additional moneys out of the impounded funds to Martha Jackson in 1920 constituted complete payment, free from contingencies, in that year and was therefore deductible in 1920 on either cash or accrual basis of reporting income for taxation—even under the Board's finding that Petitioner's 1920 RETURN was not on the accrual basis.

On the same page of Respondent's Brief appears the following language:

> "* * * the Court of Appeals based its affirmance on the ground that the amount sought to be deducted was a capital outlay and therefore not deductible at all. But, of course, an appellate court is not limited to the grounds given by the lower tribunal. *Helvering* v. *Gowran,* 302 U. S. 238, 239, 245."

By such statement Respondent seeks to skate over and gloss over the true situation.

A final decree rendered in 1919 (R. 183), from which no appeals had been taken, adjudicated your Petitioner and others to be the owners of property and impounded funds involved in litigation brought by the Secretary of the Interior and lost by him throughout all the courts. Approximately one year after such decree was rendered the Secretary arbitrarily and unlawfully promulgated an order (R. 199-201) designed and intended to require an oil company to pay approximately $300,000.00 to a certain Indian as royalty, and attempted to identify such royalty as royalty accrued under the terms of a receiver's lease, which receiver had been appointed at the demand of the Secretary, and under which lease the property had been fully developed and every barrel of oil and every dime of revenue therefrom had been produced—the title which royalty had been finally adjudicated and possession thereof awarded to Petitioner and his associates by the final decree from which no appeals had been taken. (R. 183-198)

The Record (201-252) discloses that the Secretary, by arbitrary exercise of power and by abuse of the power of his office, stopped all further judicial process in that case and, by coercion, extorted from your Petitioner and his two associates more than $200,000.00 of their impounded funds, title to which had been finally adjudicated (R. 183-198).

The Record discloses (353-355) that in its original Answer filed with the Board Respondent raised the issue that the $75,989.20 extorted from Petitioner by the Secretary was a capital investment, in that Respondent claimed it was a part of the purchase price of property; that in the continued hearing before the Board in 1939 Respondent abandoned that issue and stood exclusively upon the contention Petitioner was on the cash basis of accounting and

reporting (R. 423-550), and in consequence thereof the Board in rendering its memorandum opinion expressly refused to consider the issue of capital investment or to find the facts thereof (R. 623);

That nevertheless, on review by the Court of Appeals Respondent raised the issue of capital investment, presented and urged that the $75,989.20 represented:

> "* * * the amount of his share of an increase in the purchase price of an Indian allotment the title to which was then in litigation, which the petitioner and his associates had allegedly agreed to make in that year in compliance with an order of the Secretary of the Interior."

The appellate court seized upon such newly raised issue and without jurisdiction so to do made its own independent findings of fact thereof, avoided deciding the question of law arising out of the facts so found—namely, the invalidity of the Secretary's order—and arbitrarily and capriciously affirmed the Board's decision. (*Owens* v. *Commissioner,* 125 F. (2d) 210.)

The appellate court had no jurisdiction or power to so proceed and its opinion is void on its face. *Rapeer* v. *Colpoys, United States Marshal,* (App. D. C.) 85 F. (2d) 715, 717; *United States* v. *Walker,* 109 U. S. 258, 266, 3 S. Ct. 277, 27 L. ed. 927; *Robinson, et al.,* v. *Elder,* (9th Cir., Nev.) 78 F. (2d) 817, 818; *Reynolds* v. *Stockton,* 140 U. S. 254, 268, 35 L. ed. 464, 468; *Helvering* v. *Rankin, et al.,* 295 U. S. 123, 79 L. ed. 1343; *Helvering* v. *Nat. Grocery Co.,* 304 U. S. 282, 82 L. ed. 1346, 1356; *Helvering* v. *Tex-Penn Oil Co.,* 300 U. S. 481, 81 L. ed. 755, 756; *Helvering* v. *Wood,* 309 U. S. 344, 84 L. ed. 796, 799; *Patton, et al.,* v. *Com. of Int. Rev.,* (6th Cir., Ohio) 168 F. (2d) 28; *Ross* v. *Commissioner,* 169 F. (2d) 483, 496; *Levitt & Sons* v. *Nunan,*

(2d Cir.) 142 F. (2d) 795; *Levitt & Sons* v. *Nunan,* (2d Cir.) 160 F. (2d) 209; *Hormel* v. *Helvering,* 312 U. S. 552, 85 L. ed. 1037; *Helvering* v. *Gowran,* 302 U. S. 238, 239, 245.

True, an appellate court is not limited to the grounds given by the Board for its decision, but equally true the appellate court IS limited to the facts found by the Board—and the appellate court has no jurisdiction or power to make its own independent findings of fact or to draw inferences therefrom.

Where the appellate court accepts new grounds or a new theory not urged or tried by the Board, it is mandatory upon the court to remand the case to the Board for hearing of the facts of such new ground or theory.

The case of *Helvering* v. *Gowran,* 302 U. S. 238, 239, 245, cited in Respondent's Brief In Opposition, sustains the foregoing statement and destroys the contention stated on page 6 of Respondent's Brief.

In *Helvering* v. *Gowran, supra,* this Court held:

> "If the Court of Appeals had accepted the theory it would have been open to the taxpayer to urge, in view of the new issue presented that he should have the opportunity to establish before the Board additional facts which would affect the result. As we accept the new theory, leave is granted Gowran to apply to the lower court for that purpose."

Petitioner was afforded no such relief or remedy in this case. He was not given an opportunity to offer his proof on the newly raised issue of capital investment or capital outlay. The appellate court's accepting such newly raised ground or theory, its making its own independent findings of fact, its avoiding a decision of the question of law arising out of the facts so found, and its arbitrarily affirming the

Board's decision, within themselves and standing apart from the acts of all others representing the Commissioner there or Respondent here, was a denial to Petitioner of due process of law, a denial of a full hearing as well as denial of an opportunity to be heard.

In paragraph 2 on page 6, reference is made by Respondent to numerous pages of the Record. Examination of the Record will reveal that such page references are to the oral testimony of witnesses and to comments by Petitioner during the course of the trial. With meticulous care throughout Respondent's entire brief no reference is made to any of the documentary evidence which proved and established the conspiracies, and the frauds perpetrated upon Petitioner pursuant thereto—nor to Respondent's suppression of other documentary evidence and the testimony of witnesses under its control.

On page 7 of Respondent's Brief appears the following language:

> "* * * and the case was subsequently tried alone upon a new stipulation of facts (R. 453-460) and other evidence (R. 423-550). The stipulation which Secord had entered into *was not introduced at this hearing*, and there is nothing whatsoever in the record to substantiate the taxpayer's charge (Pet. 17) that the Board based its conclusion on such stipulation." (Italics mine.)

Petitioner will first discuss the last, or full, sentence in the above-quoted excerpt, which is a false statement.

The Record discloses Petitioner never contended such stipulation entered into by Secord was "introduced at this hearing"—meaning the hearing before the Board in 1939.

But, the Record does disclose (437) that Respondent's counsel stated:

"We stipulated these facts before. If it is good enough for one case it is good enough for this case. The fact of the matter is in docket No. 14379 I think Your Honor will find that stipulation in the file."

and thereafter Petitioner was required to use, but permitted to correct, the so-called Secord stipulation, where corrections could be agreed upon, otherwise Petitioner offered documentary and oral evidence to prove the facts omitted from the so-called Secord stipulation and also to correct the falsely stated facts in such stipulation.

On page 17 of Petitioner's Petition, cited by Respondent, the following language is used:

"Although Petitioner was thereafter ostensibly relieved from the aforesaid frauds and the effect of the fraudulently stipulated, falsely stated facts of his defense and was ostensibly granted a hearing on the merits of his defense, nevertheless, at a later hearing and by its decision the Board held Petitioner was bound by the identical falsely stated facts PREVIOUSLY fraudulently stipulated by the Commissioner's and Respondent's attorneys and the aforesaid second unauthorized attorney, and thus a second time the Board denied Petitioner due process of law." (Emphasis mine.)

As a pretended ground or reason for denying the extortion deduction on the accrual basis of reporting, the Board used the falsely stated facts PREVIOUSLY fraudulently stipulated to conjure up a fictitious contingency on Petitioner's ownership of the assigned, impounded funds.

Such fictitious contingency was the moot appeal of McKinney, the illegally appointed, interloper-guardian (R. 215-226) from an order of the Trial Court—which had entered the final and supplemental decrees (R. 183-198)—denying him leave to intervene, or to disturb those decrees or even to get into the case.

McKinney had no right to intervene or to appeal. His "appeal" was moot. Furthermore, neither Martha nor her legally appointed guardian could appeal because she, in effect, had won the lawsuit. (R. 183-193) Therefore the Secretary could not appeal in his official capacity or for her. He could not act in Martha's or Parmenter's place or stead. (*Mott* v. *United States,* 283 U. S. 747.)

Nevertheless, the Board ignored those record facts, and reached back to, resorted to and used the falsely stated facts PREVIOUSLY fraudulently stipulated as the basis for a fictitious contingency, then used such pretended but fictitious contingency as its reason for denying the extortion-deduction on the accrual basis of reporting.

Such falsely stated facts PREVIOUSLY fraudulently stipulated were stipulated to be the facts of all of Petitioner's appeals pending in 1931 before the Board. The Commissioner appealed from the Board's decision of Petitioner's 1923 case. The appellate court's opinion in that case, *Commissioner* v. *Owens,* is reported at 78 F. (2d) 768.

That case was submitted to the appellate court on the identical falsely stated facts PREVIOUSLY fraudulently stipulated in the so-called Secord stipulation. Among other false statements that stipulation falsely stated (R. 383, par. (w)) appeals were taken from the final decree. Had that statement been true then contingencies would have been created on Petitioner's ownership of his portion of the impounded funds. Since such statement was false no such contingencies existed. That false statement was corrected in the 1939 hearing before the Board (R. 459, par. (w)). In its Memorandum Opinion the Board ignored that correction and substituted language from the opinion in *Commissioner* v. *Owens (supra)* to accomplish the purpose of the false statement (R. 666-667).

The Board's opinion (621-623) itself refutes Respondent's statement:

> "There is nothing whatsoever in the Record to substantiate the taxpayer's charge (Pet. 17) that the Board based its conclusion on such stipulation."

The cited portions (R. 621-623) of the Board's Opinion call specific attention to the Court of Appeals' opinion in *Commissioner* v. *Owens*, 78 F. (2d) 768, and also call attention to the fact that Petitioner's contentions in the 1920 case were inconsistent with the facts as stated in that opinion. The Board made its conclusions square with and conform to that Appellate Court Opinion.

Moreover, the cited portions of the Board's opinion (R. 621-623) show on their face that the Board based and grounded its denial, on the accrual basis, of the extortion deduction upon the appellate court's opinion in ~~*Owens v. Commissioner*~~ v. Owens, *supra*. The Record (pp. 623-665) demonstrates in detail the errors in the Board's Opinion in the 1920 case and the fact that numerous paragraphs thereof were copied verbatim from the appellate court's opinion in *Commissioner* v. *Owens, supra,* and other findings were made therefrom without regard to the true facts proved by Petitioner and established in the Record of the 1939 hearing of Petitioner's 1920 case.

Furthermore, the Record (666-667) shows the changes made by the Board in its Memorandum Opinion, pursuant to Petitioner's motion for reconsideration. Some of such changes show on their face corrections of falsely stated facts contained in the so-called Secord stipulation. Those corrections eliminated the fictitious contingencies on Petitioner's ownership of the impounded funds assigned in 1920 —which the Board (R. 620) found and defined as "(which awarded additional moneys out of the impounded funds to Martha Jackson)". But the Board did not change its conclusions to conform to the corrections.

Such changes also show substitutions of facts stated by the appellate court (R. 667) in *Commissioner* v. *Owens, supra,* for the true facts of the 1920 case proved and established by Petitioner by documentary evidence in the 1939 hearing of the 1920 case—and the statements of fact borrowed by the Board from the appellate court's opinion in *Commissioner* v. *Owens, supra,* were made to serve the Board's purpose of deciding Petitioner did not in 1920 own,

free from contingencies, the funds impounded by the receivers.

The Board resorted to those tractics notwithstanding documentary evidence, staring it in the face, demonstrated that on June 17, 1919, by final decree, from which no appeals were taken, Petitioner was adjudicated to be the lawful owner of and was awarded possession of his portion of the impounded funds (R. 183-198).

No better proof of conspiracy and fraud to deny Petitioner consideration of the true facts of his defense, to deny him a full hearing, to deny due process of law could be imagined.

It would be highly advisable for Respondent's brief writer to carefully examine the Record and Petitioner's Petition before he attempts to distort them.

In conclusion, in support of the immediately foregoing accusation, your Petitioner calls this Honorable Court's attention to the following language at the bottom of page 7 of Respondent's Brief In Opposition, to-wit:

> "Moreover, the short answer to taxpayer's charges of conspiracy and fraud is that the Court of Appeals rejected them in the prior appeal. *Owens* v. *Commissioner,* 125 F. (2d) 210, certiorari denied, 316 U. S. 704, rehearing denied 317 U. S. 704."

A short answer to the above quoted "short answer" is that no issue of conspiracy and fraud was presented to, and therefore could not be rejected by, the Court of Appeals in the prior appeal (*Owens* v. *Commissioner,* 125 F. (2d) 210). This, for the simple reason that—after the evidence was offered but before the Board rendered its opinion Petitioner discovered proof convincing to him that the acts and conduct of the attorneys for the Commissioner of Internal Revenue resulted and flowed from a perfectly designed and

well concealed conspiracy—your Petitioner immediately sought, but was denied by the Board, leave to reopen his case and offer proof of such conspiracies and frauds.

Furthermore, Respondent's statement on page 8:

> "• • • taxpayer's unsupported epithets and allegations do not make out a case of fraud. *Kent* v. *Lake Superior Canal Co.*, 144 U. S. 75, 81."

is utterly groundless. Of course unsupported epithets and allegations do not make out a case of fraud and no authority need be cited in support of that legal axiom.

But, abundant documentary proof of allegations of conspiracy and fraud not denied by Respondent, which proof Respondent made no attempt to refute or to disprove—other than by suppressing additional documentary evidence in its exclusive custody and by suppressing the oral testimony of witnesses under its exclusive control—DOES make out a case of conspiracy and fraud, and no authority need be cited to support that legal axiom.

Respectfully submitted,

O. O. OWENS,
Petitioner.